United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1468

B P/S

United States Court of Appeals

For the Second Circuit

No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased and MONICA PASTEWKA, Individually,

Plaintiffs-Appellants,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees.

and consolidated cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS "BRANDENBURG"

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Appellants
Hapag-Lloyd, A.G., and Stork
Amsterdam N.V., et al
One State Street Plaza
New York, N.Y. 10004

MACDONALD DEMING
EMIL A. KRATOVIL, JR.
Of Counsel

TABLE OF CONTENTS

CITATIONS

Cases

Statutes

United States Court of Appeals

For the Second Circuit

Docket No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Plaintiffs-Appellants,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees.

and Consolidated Cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS "BRANDENBURG"

INTRODUCTION

The Issues in Perspective

It is noteworthy that Texaco's brief nowhere denies the basic premise of Brandenburg's appeal (Point I of Brandenburg's main brief, at pp. 5-11): that an essential condition for any *forum non conveniens* transfer is the existence of an alternative forum providing plaintiffs with an *effective remedy.*

Instead of challenging this basic point, Texaco makes a number of efforts to deny or obscure the fact that Brandenburg plaintiffs if forced to go to England would lose the remedy they have in this Court.

Texaco in its brief relies primarily on the technique of repeated *assertion*: It asserts it is unable to find "any mitigating benefit" to plaintiffs in suit here (Texaco Brief, p. 14), or any "cognizable reason" for bringing suit here (Texaco Brief, p. 9); asserts that England would be a "convenient and appropriate forum" for plaintiffs (Texaco Brief, p. 14), and even claims "important advantages to plaintiffs in prosecuting their claims in England" (Texaco Brief, p. 15); and states that in England the Court "would be in a position to render complete relief" (Texaco Brief, p. 19).

The clear and overwhelming answer to these assertions is that any increased convenience in obtaining testimony is of no value to plaintiffs when they have no cause of action in the proposed alternative jurisdiction. The "cognizable reason" for suit here rather than in England is that the United States Courts provide a cause of action; the English Courts do not.

Even if the English law is "somehow less favorable to plaintiffs" (Texaco Brief, p. 39), Texaco argues, this should make no difference on its *forum nor conveniens* motion. But the cases cited by Texaco relate not to extinction of a cause of action, but rather to factors such as a less favorable measure of damages in the proposed new jurisdiction. In all the cases cited by Texaco there was an effective, though different, remedy in the proposed alternate forum. That situation is not comparable to the one in this case, where the alternative forum provides *no* effective remedy.

Anyway, Texaco argues, the United States Courts would have to apply "foreign law" to this "foreign tort" (Texaco Brief, p. 14). There is no such necessity. The law to be applied to this high seas collision is ". . . the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted", *The Belgenland*, 114 U.S. 355, 369 (*see* Point I, *infra*).

Finally, Texaco attempts to gloss over the vital difference between English and American law, asserting (Texaco Brief, p. 32) that American law is "basically the same" as English law.

This assertion is based on a faulty and misleading analysis first of the English (Point II, *infra*), and then of the United States (Point III, *infra*) authorities.

Texaco's assertions are demonstrably incorrect, because based on three major incorrect premises. These incorrect premises concern:

I. The law applicable to high seas collision claims between vessels of different flags tried in United States Courts. *The only law applicable to such claims is the General Maritime Law as applied by the United States Courts*, and not foreign law, as Texaco alleges;

II. The English authorities regarding release of an owner of a hazardous wreck from his duty to warn other vessels of danger by locating and marking his wreck. *The English cases hold that a wreck owner can be relieved of this duty simply by giving notice to appropriate authority.* Texaco incorrectly contends that this English rule is no different from

III. The United States authorities on the same point, *which however hold that a wreck owner has a non-delegable duty to warn other vessels of danger which continues, regardless of United States Coast Guard or other official action, until an official wreck buoy has been positioned over the wreck.* Texaco's contention that the English and United States rules are identical is flatly wrong.

POINT I

The Only Law Applicable to Plaintiffs Hapag-Lloyd, and Stork Amsterdam N.V., et al.'s High Seas Collision Claims is the General Maritime Law, as Applied in and by the United States Federal Courts.

Texaco argues at pp. 16-17 of its brief that the rights of all parties to this litigation are governed by foreign law, and that United States law is a "total stranger" to the collision. This is a flat misstatement of the consistent string of precedents which establish that the General Maritime Law, as applied by the Federal United States District Courts, is the *only* law applicable to high seas collision claims tried between vessels of different flags in the United States.

> ". . . if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; * * * If [the vessels concerned] belong to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, *the law of the forum, that is, the Maritime Law as received and practised*

therein, would properly furnish the rule of decision". *The Scotland*, 105 U.S. (15 Otto) 24, 29-30 (1881).

The law applicable to a collision

> ". . . on the high seas, not within the jurisdiction of any nation . . ." is " . . . the General Maritime Law, as understood and administered in the courts of the country in which the litigation is prosecuted." *The Belgenland*, 114 U.S. 355, 369 (1885).

The law in this Circuit is naturally in accord:

> ". . . the collision was on the high seas between vessels flying different flags; and it has been the law of this country, at least since *The Scotland*, 105 U.S. 24, 30, 26 L. Ed. 1001, that in such a situation the law to be administered is 'the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision.'" *Kloeckner Reederei* v. *A/S Hakedal*, 210 F. 2d 754, 756 (2 Cir. 1954), *cert. dism.*, 348 U.S. 801 (1955).

And also in the Southern District of New York:

> "Under the American conflict of law rules, the law applicable to a collision on the high seas is the law of the forum (American Law) unless the law of the flag of each of the colliding vessels is the same. In the latter case, or where both vessels are of the same nationality, the law common to both vessels will be applied". *Pacific Vegetable Oil Corp.* v. *S/S Shalom*, 257 F. Supp. 944, 946 (S.D.N.Y. 1966).

In the present case the collision took place on the high seas between vessels flying Liberian (Texaco Caribbean) and German (Brandenburg) flags. It is simply not open to

question that the high seas collision claims of the Brandenburg and her cargo, when tried here, will be dealt with according to the General Maritime Law as applied in the Federal United States Courts.[1]

POINT II

In England, Brandenburg Plaintiffs Would Have No Remedy Against Texaco, Simply Because Texaco Gave Notice to Trinity House of the Wreck of the Texaco Caribbean.

Texaco quotes out-of-context language from *The Douglas*, [1882] 7 P.D. 151, that negligence by a wreck's owner must be proved as a basis of liability to another ship damaged by collision with the wreck. True. But the point of *The Douglas* is precisely that under the English rule all that is required to avoid liability for negligence, is the giv-

1. For this reason Texaco's argument that these cases should be dismissed, because of supposed problems in applying foreign law, is wholly inapplicable to plaintiffs Hapag-Lloyd, and Stork Amsterdam N.V., *et al.* All the cases cited by Texaco appellees for this proposition are irrelevant to these plaintiffs: *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499, 502 (2 Cir. 1966); *Domingo* v. *States Marine Lines*, 340 F. Supp. 811, 816 (S.D.N.Y. 1972); *De Sairigne* v. *Gould*, 83 F. Supp. 270, 272 (S.D.N.Y. 1949), *aff'd.* 177 F. 2d 515 (2 Cir. 1949), *cert. den.* 339 U.S. 912 (1950); *Poutos* v. *Mene Grande Oil Co.*, 123 F. Supp. 577, 578 (S.D.N.Y. 1954); *Spencer* v. *Alcoa S.S. Co.*, 221 F. Supp. 343, 344 (E.D.N.Y. 1963) *aff'd per curiam*, 324 F. 2d 957 (2 Cir. 1963); *Charter Shipping Co.* v. *Bowring*, 281 U.S. 515, 518 (1930); *Hatzoglou* v. *Asturias Shipping Co., S.A.*, 193 F. Supp. 195, 197 (S.D.N.Y. 1961); *Scognamiglio* v. *Home Lines*, 246 F. Supp. 605, 1966 A.M. C. 223, 224 (S.D.N.Y. 1965); *Garis* v. *Cia. Mar. San Basilio, S.A.* 386 F. 2d 155, 157 (2 Cir. 1967); *Romero* v. *I.T.O.*, 358 U.S. 354, 381-4 (1959); and *Lauritzen* v. *Larsen*, 345 U.S. 571, 584-6, 590-3 (1953). In addition, these cases all deal with purported applicability of statutory law relating to personal injury recoveries; none deal in any way with the General Maritime Law as it applies to high seas collisions between ships flying different flags.

ing of notice of the wreck to the appropriate authority. Thereafter, even *total inaction* by the owner of the wreck is not considered negligence.

The *reason* why the Court in *The Douglas* absolves the wreck owners from a charge of negligence appears from the opinion of Lord Coleridge, C.J., omitted by Texaco:

> "But it was stated to the mate of the *Douglas* that the harbour-master had undertaken to light the wreck; there was therefore evidence that the mate who represented the defendants thought that the harbour-master had undertaken to light the wreck. * * * It has been argued that an action is maintainable, because it does not appear that the harbour-master performed the duty: but it must be inferred upon these facts that he undertook to do the duty, and at least the mate of the *Douglas* had fair ground for supposing that he would perform it." [1882] 7 P.D., at p. 158.

And from the opinion of Brett, L.J.:

> "As to the mate, he gave instructions to the captain of the tug *Endeavor* to inform the harbour-master. The latter evidently took it as a piece of information upon which he was to act, for he in effect promised to send lights within an hour. The mate of the *Douglas* had a right to assume that the harbour-master would do what he promised. *Upon the evidence before us there was no negligence and no liability upon the defendants.*" *(Emphasis supplied)*, [1882] 7 P.D., at p. 160.

Texaco's attempt to deny that the English authorities provide that "mere notice to a governmental agency" relieves the wreck owner of liability is further contradicted

by the opinion of Lord Justice Cotton in *The Douglas*, also ignored by Texaco:

> "* * * it is proved by the deposition of the mate of the *Douglas* that the collision was reported to the harbour-master, and that the mate did receive a communication from the harbour-master. *This circumstance exonerates the defendants from the charge of negligence, for it gave the harbour-master notice to perform the duty.*" *(Emphasis supplied)*, [1882] 7 P.D., at p. 161.

Texaco's assertion is similarly directly contradicted by the opinion of the House of Lords in *The Utopia*, [1893] A.C. 492. The House of Lords expressly relied on *The Douglas*, describing it as "very similar" to *The Utopia* case, [1893] A.C., at p. 497. The House of Lords pointed out that the Court of Appeal in *The Douglas* had reversed the decision by the Trial Court, and held defendants free of liability, "on the ground that, *inasmuch as notice was given to the harbour-master, the defendants were not guilty of negligence*". *(Emphasis supplied)*, *id.*

The House of Lords then stated that although general ownership by the wreck owner had not been abandoned, "*the control and management of the wreck, so far as related to the protection of other vessels from her, and of her from them, was properly transferred to the port authority.*" *(Emphasis supplied)*, *id.*

The House of Lords finally held that it was not negligent for the owners of the wreck to take no further action after this yielding of control to the port authority.

The clear result of the English authorities, both in the Court of Appeal and in the House of Lords, is that when the owner of a wreck has notified the appropriate authority

and reasonably understands that that authority will take action, the wreck owner has no further responsibility to locate and mark the wreck. In the present case it is not denied—indeed it is asserted by Texaco—that Trinity House, described by Texaco as having "the duty of locating and marking wrecks off the Coast of England", was advised of the casualty by Texaco "almost immediately", and, accepting its responsibilities, "dispatched the vessel Siren to the scene of the casualty". (Affidavit of E.F. Pointon in support of motion to dismiss, Appendix 77a-78a).

Under the English authorities, that ended Texaco's rseponsibilities to locate and mark. Not so under the rule recently laid down by this Court.

POINT III

Under the Rule of this Circuit Brandenburg Plaintiffs Have a Remedy Against Texaco for Its Inaction, Despite Texaco's Notice to Trinity House.

Texaco in its brief makes an ingenious but transparent effort to overlook the fact that this Court has specifically disapproved those portions of some of its earlier opinions which accepted the English rule of *The Douglas, supra,* that a mere request to appropriate authority is sufficient to relieve a wreck owner from the need of further effort to protect the public.

Texaco emphasizes that in 1915, in *The Plymouth,* 225 F. 483 (2 Cir.), this Court quoted *The Douglas* with approval. This is true. Again in 1927, in *Red Star Towing & Transportation Co.* v. *Woodburn,* 18 F. 2d 77 (2 Cir.), in a case where the wreck owner, after notifying the Lighthouse Department, then asked the Department to do nothing, this Court said, citing *The Plymouth:*

> "Not only did he do nothing, but he directed the Department to do nothing, though, *had he told them to proceed, he would have been absolved. The Plymouth*, 225 F. 483 (C.C.A. 2)." (*Emphasis added*), 18 F. 2d, at p. 79.

In 1947, in *Petition of Anthony O'Boyle, Inc.*, 161 F. 2d 966 (2 Cir.), this Court, again citing *The Plymouth*, said:

> ". . . we note, in passing, the reasonableness of Miss O'Boyle's assumption that notification of the Coast Guard was equivalent to a request that they mark the wreck; *such a request would probably have been sufficient to discharge O'Boyle's duty to mark.* See *The Plymouth*, 2 Cir., 225 F. 483." (*Emphasis added*), 161 F. 2d, at p. 967.

Since this Court's decision in 1951, however, in the landmark case of *Berwind-White Coal Mining Co.* v. *Pitney Eureka No. 1107*, 187 F. 2d 665 (2nd Cir.), the law in this Circuit has dramatically changed. In that case, the Coast Guard had been notified of the wreck, and was actively engaged in searching for it. Under the rule of *The Douglas*, as previously approved by this Court, this notification would have absolved the owners from further duty to protect the public. But this Court, in language understandably omitted by Texaco in its brief, rejected its earlier *dicta* and with them the English rule:

> "Nor do the unsuccessful efforts of the Coast Guard to locate and mark the wreck affect this liability. * * * *the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to*

> *mark.* The Snug Harbor, 4 Cir. 40 F. 2d 27. *The dicta in Petition of Anthony O'Boyle, Inc., 2 Cir. 161 F. 2d 966, 967, and Red Star Towing & Transportation Co.* v. *Woodburn, 2 Cir. 18 F. 2d 77, 79, which may indicate the contrary should be discounted accordingly."* (*Emphasis added*), 187 F. 2d, at p. 669.

The *holding* of *The Plymouth, supra,* remains valid: In that case the government authorities had actually *buoyed* the wreck, even though badly. But the English rule of *The Douglas* as formerly approved by this Court, that mere notice to governmental authorities will discharge a wreck owner from further obligation to the navigating public, has been expressly disapproved and is no longer followed in this Circuit.

That this is so emphatically appears from a recent decision by Judge Leonard P. Moore sitting by designation, *Marine Towing, Inc.* v. *Red Star Towing & Transportation Co., (not off. rep't'd.)*, 1974 A.M.C. 691 (E.D.N.Y. 1973), appeal dismissed by stipulation filed April 10, 1974.[2]

In *Marine Towing,* the owners of the wrecked tug Ocean Queen were held responsible for neglect of their duty

2. Although this case, like *Berwind-White,* was decided under The Wreck Statute, 33 U.S.C. § 409, that Statute is simply declaratory of the existing General Maritime Law which imposes on an owner a non-delegable duty to locate and mark his wreck. (See authorities cited footnotes 4, pp. 11-12, Main Brief of Brandenburg Plaintiffs). The *Marine Towing* case, and the rule of *Berwind-White, supra,* are therefore applicable to the present high seas case.

As stated in *Madeleine Wheeldon* v. *United States of America,* 184 F. Supp. 81, 83 (N.D. Cal. 1960), The Wreck Statute "formalized *the duty which the owner of a wrecked vessel had under the general maritime law to mark the wreck* * * *".

to protect other vessels by marking their wreck, *even though* the Coast Guard had: (1) placed a red flag upon the mast of the wreck; (2) assisted in placing a lantern upon the mast of the wreck; and (3) stationed a USCG patrol boat in the area, which was using its voice radio to warn passing traffic about the presence of the wreck. It was held that the duty of the wrecked Ocean Queen's owner to protect other vessels did not cease until the Coast Guard had actually placed its own permanent wreck buoy over the wreck.

In this case the tug Ocean Queen sank in mid-channel in the Hellgate area of New York harbor following an initial collision with another vessel. Some hours later, the tug Evelyn struck the Ocean Queen's wreck and was damaged; Evelyn's owners sued the owners of the Ocean Queen. The Ocean Queen's owners tried to contend that their duty to mark their wreck had ended by the time the Evelyn struck, on the basis that the Coast Guard had by that time assumed responsibility for marking the wreck. As noted above, at the time the Evelyn struck the wreck the Coast Guard had in fact hung both a flag and a lantern on the mast of the wrecked Ocean Queen, and the wreck's owner had left the area "*with the knowledge that a Coast Guard buoy tender was due to arrive at any moment to place a large wreck buoy over the Ocean Queen*". 1974 A.M.C., at p. 694.

The Ocean Queen's owners—like Texaco here—urged on the Court an out-of-context excerpt from *Berwind-White, supra:*

> " 'It has long been the law that an owner may comply with the statutory requirement for marking [a wreck] by getting the [Coast Guard] to do it; when the Coast Guard does mark the wreck, whether

> properly or not, the owner is relieved of any statutory duty in that respect.' 1951 A.M.C. at 643, 187 F. (2d) at 669.
>
> See also, *Plymouth*, 225 Fed. 483, 485 (2 Cir., 1915), cert. denied, 241 U.S. 675." 1974 A.M.C., at p. 694.

Judge Moore however held *The Plymouth* not in point. (As noted, in *The Plymouth*, the Coast Guard had actually placed its buoy.) In the *Marine Towing* case, the Coast Guard had not yet "actually marked the wreck with its own buoy". 1974 A.M.C., at p. 694. Judge Moore held that until the Coast Guard did so, *none* of the preliminary steps taken by the Coast Guard relieved the Ocean Queen's owner of its continuing duty to mark:

> "The fact that here the Coast Guard had placed a flag on the mast of the *Ocean Queen* shortly after it had sunk, had assisted the *Port Jefferson* in hanging the lantern, and had stationed a vessel in the area to monitor the radio channel used by mariners for bridge-to-bridge communications in order to direct vessels in the area around the wreck does not mean that the Coast Guard had marked, or had assumed responsibility for marking, the wreck so that Red Star was under no further obligation under the Wreck Statute." 1974 A.M.C., at p. 695.

The Court held that the wreck owner's continuing duty would not end "until the Coast Guard had marked the wreck with its more permanent buoy". *Id.*

CONCLUSION

For purposes of this motion to dismiss on grounds of *forum non conveniens*, the facts contended for by Brandenburg plaintiffs should be accepted as correct. Under these facts Trinity House, the appropriate English Lighthouse Authority, had been notified of the wreck of the Texaco Caribbean and had dispatched its vessel Siren to the area. But when the wreck of the Texaco Caribbean ripped open the Brandenburg and sank her immediately thereafter, the Siren had not even located, let alone marked, the wreck. She had instead stationed herself with three vertical green lights approximately one mile distant from the spot where the wreck was later found to be. She was waiting for the following morning to continue her efforts to locate and mark the wreck.

In these circumstances, under the English authorities governing the English Courts to which Texaco seeks to remit Brandenburg plaintiffs, there would be no remedy. Texaco's notification of Trinity House would deprive the owners of the totally lost Brandenburg, the owners of her totally lost cargo, and the surviving relatives of her lost crew members, of all remedy.

On the other hand, in this Court under the enlightened recent line of authority rejecting these old English cases, these plaintiffs would have a remedy.

Under the circumstances, it is earnestly submitted that mere factors of convenience cannot justify remitting these plaintiffs to a forum where they have no effective remedy.

Brandenburg plaintiffs request that the Judgment and Order of March 28, 1974 dismissing plaintiffs' consolidated cases on certain conditions (App. 380A, 381A) be reversed as a matter of law, with instructions that the case be retained for trial on the merits.

Respectfully submitted,

Dated: October 11, 1974
New York, N.Y.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Appellants
Hapag-Lloyd A/G, and
Stork Amsterdam, N.V., et al.
One State Street Plaza
New York, N.Y. 10004
(212) 344-6800

MACDONALD DEMING
EMIL A. KRATOVIL, JR.
Of Counsel

SERVICE OF THREE (3) COPIES OF THE WITHIN

Brief IS HEREBY ADMITTED

THIS 1 DAY OF [illegible] 1974

[illegible signature]

Attorney(s) for appellee

Harvey Goldstein

for

[illegible]